

1 MAYER BROWN LLP
2 John Nadolenco (SBN 181128)
3 350 South Grand Avenue, 25th Floor
4 Los Angeles, CA 90071-1503
5 Telephone: (213) 229-9500
6 jnadolenco@mayerbrown.com

7 Lauren R. Goldman (*pro hac vice*)
8 Michael Rayfield (*pro hac vice*)
9 1221 Avenue of the Americas
10 New York, NY 10020
11 Telephone: (212) 506-2647
12 lrgoldman@mayerbrown.com
13 mrayfield@mayerbrown.com

14 *Counsel for Defendant Facebook, Inc.*

15
16 **UNITED STATES DISTRICT COURT**
17
18 **NORTHERN DISTRICT OF CALIFORNIA**
19
20 **SAN FRANCISCO DIVISION**

21 IN RE FACEBOOK BIOMETRIC
22 INFORMATION PRIVACY LITIGATION

23
24 **OMNIBUS ADMINISTRATIVE MOTION**
25 **TO FILE UNDER SEAL**

26 Master Docket No.: 3:15-CV-03747-JD

27 THIS DOCUMENT RELATES TO:
28 ALL ACTIONS

[*Declaration of John Nadolenco and
Proposed Order filed concurrently herewith*]

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Pursuant to Civil Local Rules 7-11 and 79-5, the Stipulated Protective Order in this action (Dkt. 88), the Court's Standing Order for Civil Cases, and the Court's January 2, 2018 and February 2, 2018 orders (Dkt. 276; Dkt. 286), defendant Facebook, Inc. ("Facebook") files this omnibus administrative motion to maintain under seal certain documents filed in connection with the following motions: Facebook's motion for summary judgment, Facebook's motion to exclude portions of the expert opinions, and testimony of Dr. Atif Hashmi (Dkt. 303); Facebook's motion to strike and/or exclude the expert report of Jeffrey S. Dunn (Dkt. 305); plaintiffs' motion for partial summary judgment (Dkt. 307); and plaintiffs' motion to exclude the testimony of defendant's proposed expert Matthew Turk, Ph.D. (Dkt. 301).

Plaintiffs do not seek to maintain under seal any materials designated as "Confidential" by plaintiffs that were filed provisionally under seal by Facebook. *See Declaration of John Nadolenco in Support of the Omnibus Administrative Motion to Seal ("Nadolenco Sealing Decl.") ¶ 26.* Accordingly, these materials may be unsealed, as further delineated below.

The Nadolenco Sealing Declaration, filed concurrently with this motion, identifies the documents that Facebook seeks to maintain under seal and the bases for sealing. In accordance with Paragraph 28 of the Court's Standing Order and Local Rule 79-5(d)(1), redacted and unredacted versions of the documents that Facebook seeks to maintain partially under seal are attached to this motion if those documents differ from the versions that were submitted provisionally under seal in connection with the filings subject to this omnibus motion.¹ Facebook also submits herewith separate proposed order in the tabular format required by Local Rule 79-5(d)(1)(B) that include the reasons for sealing the material outlined below.

I. LEGAL STANDARD

Filings under seal are "the primary means by which the courts ensure full disclosure of relevant information, while still preserving the parties' (and third parties') legitimate expectation

¹ Specifically, the documents attached hereto fall into two categories: (1) documents filed by plaintiffs, for which Facebook seeks more narrow sealing than as originally filed; and (2) briefs filed by Facebook that had included provisionally redacted references to the deposition transcripts of the named plaintiffs, which plaintiffs do not request to maintain under seal.

1 that confidential business information, proprietary technology and trade secrets will not be
 2 publicly disseminated.” *In re Adobe Sys., Inc., Sec. Litig.*, 141 F.R.D. 155, 161-62 (N.D. Cal.
 3 1992). One of two standards applies depending upon whether the document is filed in
 4 connection with a dispositive or non-dispositive motion.

5 Where a “sealed discovery document [is attached] to a non-dispositive motion,” the
 6 “usual presumption of the public’s right of access is rebutted.” *Kamakana v. City & Cnty. of*
Honolulu, 447 F.3d 1172, 1179-80 (9th Cir. 2006) (quoting *Phillips v. General Motors Corp.*,
 8 307 F.3d 1206, 1213 (9th Cir. 2002)); *see In re Yahoo Mail Litig.*, 2015 WL 12990210, at *1
 9 (N.D. Cal. June 8, 2015) (motion for class certification is a non-dispositive motion). Under these
 10 circumstances, a particularized showing of “good cause” under Federal Rule of Civil Procedure
 11 26(c) will suffice to maintain the information under seal. *Id.* at 1180 (citing *Foltz v. State Farm*
 12 *Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)). The party must simply show that
 13 “specific prejudice or harm will result” from disclosure of the information. *Phillips ex rel.*
 14 *Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002); *see CreAgri, Inc.*
 15 *v. Pinnaclife Inc.*, 2014 WL 27028, at *2 (N.D. Cal. Jan. 2, 2014) (granting motion to seal
 16 portion of document that would “not further the public’s understanding of the reasoning
 17 underlying the Court’s decisions” when there was “some interest . . . in maintaining the
 18 confidentiality” of the sealed material).

19 In comparison, a party seeking to seal dispositive motion papers must show that the
 20 motion to seal is supported by “compelling reasons.” *Kamakana*, 447 F.3d at 1179. Under the
 21 heightened standard, “[t]he protection of proprietary business information and prospective
 22 business plans is a compelling reason to permit the filing of documents under seal.” *Morawski v.*
 23 *Lightstorm Entm’t, Inc.*, 2013 WL 12122289, at *2 (C.D. Cal. Jan. 14, 2013); *Bauer Bros. LLC*
 24 *v. Nike, Inc.*, 2012 WL 1899838, *2 (S.D. Cal. May 24, 2012) (same). “Where a party shows
 25 that its documents contain sources of business information that might harm its competitive
 26 standing, the need for public access to the records is lessened.” *Algarin v. Maybelline, LLC*,
 27

1 2014 WL 690410, at *3 (S.D. Cal. Feb. 21, 2014) (granting motion to seal under “compelling
 2 reasons” standard). A court may order the sealing of records under the compelling reasons
 3 standard when they contain sensitive business information, such as trade secrets. *Herron v. Best*
 4 *Buy Stores, LP*, 2015 WL 5330271, at *3 (E.D. Cal. Sept. 10, 2015); *Rich v. Shrader*, 2013 WL
 5 6190895, at *2 (S.D. Cal. Nov. 26, 2013). This type of information is regularly sealed. *See*
 6 *Apple, Inc. v. Samsung Elecs. Co.*, 2013 WL 3855529, at *2 (N.D. Cal. July 24, 2013)
 7 (permitting the sealing of proprietary data and noting that the potential competitive harm
 8 outweighed the public’s interest in accessing raw data). The sealing requests associated with the
 9 motions in the *Facebook Biometric* actions are evaluated under the compelling reasons standard.

10 **II. REQUESTS TO SEAL**

11 Generally, the information that Facebook seeks to seal contains either confidential and
 12 commercially sensitive information about Facebook’s network architecture and Facebook’s
 13 facial-recognition technology, or confidential personal information. Such information has been
 14 produced and designated by Facebook as either “Confidential,” “Highly Confidential –
 15 Attorneys’ Eyes Only” or “Highly Confidential – Source Code” under the Protective Order
 16 entered in this case. *See* Nadolenco Sealing Decl. ¶ 4.

17 **A. Facebook’s Motion For Summary Judgment**

18 **1. Declaration of Omry Yadan**

19 Facebook requests to seal confidential information contained in the redacted portions of
 20 the January 25, 2018 Declaration of Omry Yadan in Support of Facebook’s Motion for Summary
 21 Judgment (“1/25/18 Yadan Declaration”) (Exhibit 10 to the Nadolenco MSJ Declaration). Omry
 22 Yadan is a software engineer with extensive knowledge about Facebook’s network architecture
 23 and Facebook’s facial-recognition technology. The 1/25/18 Yadan Declaration discusses trade
 24 secrets and commercially sensitive information, the disclosure of which would cause Facebook
 25 competitive harm. “A trade secret may consist of any formula, pattern, device or compilation of
 26 information which is used in one’s business, and which gives him an opportunity to obtain an
 27

1 advantage over competitors who do not know or use it.” *In re Elec. Arts, Inc.*, 298 F. App’x 568,
 2 569 (9th Cir. 2008) (internal citations and quotations omitted). “One factor that weighs in favor
 3 of sealing documents is when the release of the documents will cause competitive harm to a
 4 business.” *Apple Inc.*, 727 F.3d at 1221; *see also Nat’l Labor Relations v. CEMEX, Inc.*, 2009
 5 WL 5184695, at *2 (D. Ariz. Dec. 22, 2009), *as amended* (Feb. 1, 2010); *Morawski v.*
 6 *Lightstorm Entm’t, Inc.*, 2013 WL 12122289, at *2 (C.D. Cal. Jan. 14, 2013) (“The protection of
 7 proprietary business information . . . is a compelling reason to permit the filing of
 8 documents under seal”).

9 In his declaration, Mr. Yadan addresses Facebook’s network architecture and the way in
 10 which those systems interact with and support Facebook’s facial-recognition technology.
 11 Mr. Yadan also describes how Facebook’s facial-recognition technology works, and how that
 12 technology is applied to photographs uploaded to Facebook. Facebook has designated this
 13 information “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” under the
 14 Protective Order. Nadolenco Sealing Decl. ¶¶ 4, 9. Moreover, Facebook maintains the details
 15 of how its facial-recognition technology works as a trade secret, including the details in
 16 Mr. Yadan’s declaration regarding the percentage of faces in uploaded photos that are detected
 17 and the percentage of detected faces that are “recognizable.” 1/25/18 Yadan Declaration ¶ 13.
 18 Its public release would cause Facebook harm by providing competitors—particularly those who
 19 also use facial recognition—with insight into how Facebook designs its computer systems and its
 20 proprietary facial-recognition technology. *Id.* Further, public disclosure of information related
 21 to Facebook’s network architecture and how its architecture is used in connection with facial
 22 recognition could put Facebook and the people who use Facebook at increased risk of cyber
 23 attack by malicious actors. *See Facebook Biometric Dkt. 257-9* (“12/7/17 Yadan Decl.”) ¶ 34.
 24 Thus, the requested portions of the 1/25/18 Yadan Declaration should be maintained under seal.

25 **2. Declaration of Benjamin Strahs**

26 Facebook requests to seal confidential information contained in the redacted portions of

1 the January 25, 2018 Declaration of Benjamin Strahs (Exhibit 16 to the Nadolenco MSJ
 2 Declaration) (“Strahs Decl.”). The redacted information references and discusses the
 3 information contained in Exhibit 1 thereto, which Facebook seeks to seal because it contains
 4 confidential information related the *Facebook Biometric* plaintiffs’ account settings. Nadolenco
 5 Sealing Decl. ¶ 4, 10. Facebook considers this information about its users to be non-public and
 6 takes steps to prevent the information from becoming publicly available or available to people
 7 outside of Facebook. 12/2/17 Yadan Decl. ¶ 29; Strahs Decl. ¶ 5.

8 **3. Expert Reports**

9 The Court should seal the December 22, 2017 Expert Report of Matthew Turk, Ph.D.,
 10 (Exhibit 3 to the Declaration of John Nadolenco in Support of Facebook’s Motion for Summary
 11 Judgment (“Nadolenco MSJ Declaration”)), the February 2, 2018 Rebuttal Expert Report of
 12 Matthew Turk, Ph.D. (Exhibit 4 to the Nadolenco MSJ Declaration), the February 2, 2018 Expert
 13 Report of Jeffrey S. Dunn (Exhibit 7 to the Nadolenco MSJ Declaration), and the December 22,
 14 2017 Expert Report of Dr. Atif Hashmi (Exhibit 9 to the Nadolenco MSJ Declaration), because
 15 each of these reports contains a detailed analysis of Facebook source code and other internal
 16 documents relating to Facebook’s facial-recognition technology, which Facebook has designated
 17 as “Confidential,” “Highly Confidential – Attorneys’ Eyes Only,” or “Highly Confidential –
 18 Source Code” pursuant to the Protective Order. Nadolenco Sealing Decl. ¶ 19. Its public release
 19 would cause Facebook harm by providing competitors—particularly those who also use facial
 20 recognition—with insight into how Facebook designs its computer systems and its proprietary
 21 facial-recognition technology. *See* 12/2/17 Yadan Decl. ¶ 34. Further, public disclosure of
 22 information related to Facebook’s network architecture and how its architecture is used in
 23 connection with facial recognition could put Facebook and the people who use Facebook at
 24 increased risk of cyber attack by malicious actors. *Id.* For these reasons, among others,
 25 Facebook takes steps to ensure that the information set forth in Dr. Turk’s expert report is not
 26 disclosed to competitors or otherwise made publicly known. *Id.*

4. Excerpts from the Taigman and Yadan Depositions

Facebook’s motion for summary judgment also attached excerpts from the deposition transcripts of Facebook witnesses Yaniv Taigman and Omry Yadan. Mr. Taigman and Mr. Yadan testified about Facebook’s proprietary facial-recognition technology, its network architecture and the way in which Facebook’s systems interact with and support Facebook’s facial-recognition technology. *See* Nadolenco Sealing Decl. ¶ 16. Mr. Taigman and Mr. Yadan further testified concerning how Facebook applies its facial-recognition technology to photographs uploaded to Facebook. *Id.* This information has been designated “Highly Confidential – Attorneys’ Eyes Only” in accordance with the Protective Order and has not been disclosed to third parties. *Id.* The disclosure of this information would cause competitive harm to Facebook by providing direct insight into highly confidential, proprietary, and competitively sensitive aspects of Facebook’s proprietary technology and its internal business processes and strategies. 12/7/17 Yadan Decl. ¶ 34; Nadolenco Sealing Decl. ¶ 17. Public release of this information would cause Facebook harm by providing competitors—particularly those who also use facial recognition—with insight into how Facebook designs its computer systems and its proprietary facial-recognition technology. 12/7/17 Yadan Decl. ¶ 34; Nadolenco Sealing Decl. ¶ 8, 17. Further, public disclosure of information related to the details of Facebook’s network architecture could put Facebook and the people who use Facebook at increased risk of cyber attack by malicious actors. 12/7/17 Yadan Decl. ¶ 34; Nadolenco Sealing Decl. ¶¶ 8, 17. Accordingly, the Court should seal the relevant portions of the October 18, 2019 Taigman deposition and the October 26, 2017 Yadan deposition transcript excerpts filed in connection with Facebook’s motion for summary judgment.

5. Excerpts from the Hashmi and Dunn Depositions

Facebook attached to its motion for summary judgment excerpts from the February 23, 2018 deposition testimony of Dr. Atif Hashmi (Exhibit 8 to the Nadolenco Declaration) and the February 26, 2018 deposition testimony of Jeffrey S. Dunn (Exhibit 11 to the Nadolenco MSJ).

1 Declaration), both of whom testified in detail regarding their analyses of Facebook's network
 2 architecture and its facial-recognition technology, based on discovery material that Facebook has
 3 designated as "Confidential," "Highly Confidential – Attorneys' Eyes Only," or "Highly
 4 Confidential – Source Code" pursuant to the Protective Order. Nadolenco Sealing Decl. ¶ 20.
 5 The public release of this information would cause Facebook harm by providing competitors—
 6 particularly those who also use facial recognition—with insight into how Facebook designs its
 7 computer systems and its proprietary facial-recognition technology. *See* 12/7/17 Yadan Decl.
 8 ¶ 34. Further, public disclosure of information related to Facebook's network architecture and
 9 how its architecture is used in connection with facial recognition could put Facebook and the
 10 people who use Facebook at increased risk of cyber attack by malicious actors. *Id.* For these
 11 reasons, among others, Facebook takes steps to ensure that the information set forth in Dr. Turk's
 12 expert report is not disclosed to competitors or otherwise made publicly known. *Id.*

13 **6. Certain Exhibits to Facebook's Motion**

14 Facebook seeks to seal Exhibits 14 and 15 to the March 15, 2018 Declaration of Robert
 15 Sherman ("Sherman Declaration"), Exhibit 2 to the March 14, 2018 Declaration of Yaniv
 16 Taigman ("Taigman Declaration"), and Exhibit 1 to the March 13, 2018 Declaration of Dan
 17 Barak submitted in support of Facebook's motion for summary judgment in *Facebook Biometric*.
 18 These exhibits are copies of Facebook business records that discuss how Facebook's proprietary
 19 facial-recognition technology works and the way in which Facebook's computer systems interact
 20 with and support Facebook's facial-recognition technology. Nadolenco Sealing Decl. ¶ 11.
 21 Facebook also seeks to seal Exhibit 12 to the Sherman Declaration, which reflects internal drafts
 22 and communications regarding Facebook's position on proposed Australian privacy law reforms.
 23 *Id.* Each of these documents has been produced by Facebook in this litigation and designated as
 24 "Confidential" or "Highly Confidential – Attorneys' Eyes Only" pursuant to the Protective
 25 Order. *Id.* Facebook's good cause to seal these records is detailed in paragraph 34 of the Yadan
 26 Declaration, namely, that public release of this information would cause Facebook harm by
 27

1 providing competitors with insight into how Facebook designs its computer systems and its
 2 proprietary facial-recognition technology. *See* 12/7/17 Yadan Decl. ¶ 34; Sherman Decl. ¶ 20;
 3 Taigman Decl. ¶ 3; Barak Decl. 3.

4 **7. Portions of Facebook's Motion**

5 In accordance with Local Rule 79-5, Facebook has narrowly redacted portions of its
 6 motions for summary judgment that reference or quote from confidential information contained
 7 in the expert reports, confidential deposition testimony, and exhibits that Facebook seeks to
 8 maintain under seal. Nadolenco Sealing Decl. ¶ 24-25.

9 **B. Plaintiffs' Opposition to Facebook's Motion For Summary Judgment**

10 **1. Expert Reports**

11 Exhibits 27 and 30, 31, and 32 to the Declaration of Shawn A. Williams in Support of
 12 Plaintiffs' Opposition to Facebook's Motion for Summary Judgment ("Williams MSJ Opp.
 13 Decl.") are copies of the same expert reports appearing at Exhibits 4, 7, 3, and 9 to the
 14 Nadolenco MSJ Declaration, respectively. The Court should seal these exhibits for the reasons
 15 identified above at II.A.3.

16 **2. Excerpts From the Taigman and Yadan Depositions**

17 Facebook seeks to seal the deposition transcripts from the October 18, 2016 deposition of
 18 Yaniv Taigman (Exhibit 14 to the Williams MSJ Opp. Declaration) and the October 26, 2017
 19 deposition of Omry Yadan (Exhibit 33 to the Williams MSJ Opp. Declaration).² The compelling
 20 reasons to seal Mr. Taigman's and Mr. Yadan's deposition testimony are described above at A.4.

21
 22 ² In some instances, plaintiffs submitted complete copies of deposition transcripts rather
 23 than excerpts reflecting pages cited in their briefing. Facebook respectfully submits that the non-
 24 cited pages have no bearing on the issues to be decided on the motions to which they relate and
 25 should be sealed for this additional reason. *See CreAgri, Inc.*, 2014 WL 27028, at *2 (granting
 26 motion to seal portion of document that would "not further the public's understanding of the
 27 reasoning underlying the Court's decisions"). Nadolenco Sealing Decl. ¶¶ 18, 21. As
 attachments to this motion, Facebook is submitting sealed and public-redacted versions of the
 transcripts (Exhibits 14, 15, 28, 33, and 34 to the Williams MSJ Opp. Declaration) that exclude
 non-cited pages. Facebook requests that the copies of the full transcripts as initially submitted by
 plaintiffs remain entirely under seal.

3. Excerpts from the Hashmi, Turk, and Dunn Depositions

Facebook seeks to seal the deposition transcripts from the February 23, 2018 deposition of Dr. Atif Hashmi (Exhibit 15 to the Williams MSJ Opp. Declaration) and the February 26, 2018 deposition of Jeffrey S. Dunn (Exhibit 34 to the Williams MSJ Opp. Declaration). The compelling reasons to seal Dr. Hashmi’s and Mr. Dunn’s deposition testimony are described above at II.A.5. Facebook also seeks to seal the deposition transcripts from the February 28, 2018 deposition of Dr. Matthew Turk (Exhibit 28 to the Williams MSJ Opp. Decl.), because Dr. Turk’s deposition testimony because—like Dr. Hashmi and Mr. Dunn—Dr. Turk testified in detail regarding their analyses of Facebook’s network architecture and its facial-recognition technology, the underlying documents for which Facebook has designated as “Confidential,” “Highly Confidential – Attorneys’ Eyes Only,” or “Highly Confidential – Source Code” pursuant to the Protective Order. Nadolenco Sealing Decl. ¶ 19. Public release of this information would cause Facebook harm by providing competitors—particularly those who also use facial recognition—with insight into how Facebook designs its computer systems and its proprietary facial-recognition technology. *See* 12/7/17 Yadan Decl. ¶ 34.

4. Certain Exhibits to Plaintiffs' Opposition

Plaintiffs' opposition to Facebook's motion for summary judgment attached certain documents that reveal Facebook's trade secrets and confidential business information. Exhibits 1, 3, 8, 16, and 35 contain confidential information relating to the details of Facebook's network architecture and its facial recognition technology, which Facebook has designated as "Confidential" or "Highly Confidential—Attorneys' Eyes Only" pursuant to the Protective Order. Public release of this information would cause Facebook harm by providing competitors with insight into how Facebook designs its computer systems and its proprietary facial-recognition technology. Further, public disclosure of information related to Facebook's network architecture and how its architecture is used in connection with facial recognition could put

1 Facebook and the people who use Facebook at increased risk of cyber attack by malicious actors.

2 12/7/17 Yadan Decl. ¶ 34; Nadolenco Sealing Decl. ¶ 11.

3 Exhibits 24, 25, and 26 identify the personal email addresses, home telephone numbers,
 4 and IP addresses and other information associated with plaintiffs' activity on Facebook.
 5 Facebook considers this information about its users to be non-public and takes steps to prevent
 6 the information from becoming publicly available or available to people outside of Facebook.

7 12/7/17 Yadan Decl. ¶¶ 28-29; Nadolenco Sealing Decl. ¶ 13.

8 Exhibit 36 contains confidential information and discussions relating to Facebook's
 9 product and marketing strategies. Because public release of this information would cause
 10 Facebook harm by providing its competitors with insight into Facebook's product and marketing
 11 strategies, this exhibit should be sealed. *See, e.g., Bauer Bros. LLC v. Nike, Inc.*, 2012 WL
 12 1899838, at *2 (S.D. Cal. May 24, 2012) (risk of "improper use by business competitors seeking
 13 to replicate Nike's business practices and circumvent the considerable time and resources
 14 necessary in product and marketing development" "outweigh the public's interest in disclosure"
 15 of Nike's "marketing strategies" and "product development plans"); *Rich v. Hewlett-Packard*
 16 Co., 2009 WL 10628294, at *1 (N.D. Cal. Dec. 14, 2009) ("sensitive and proprietary" nature of
 17 "marketing and disclosure strategies" are a compelling reason to seal).

18 Finally, Exhibit 38 reflects communications between Facebook and Senate Judiciary
 19 Subcommittee on Privacy, Technology & the Law ("Subcommittee") concerning an inquiry by
 20 the Subcommittee about Facebook's facial-recognition technology. Facebook's communications
 21 with the Subcommittee occurred under a mutual understanding that they would be kept
 22 confidential. Sherman Decl. ¶ 20; Nadolenco Sealing Decl. ¶ 11. For these reasons, Facebook
 23 requests that the Court maintain the seal on Exhibits 1, 3, 8, 16, 24-26, 35, 36, and 38 to the
 24 Williams MSJ Opp. Declaration.

25 **5. Portions of Facebook's Discovery Responses**

26 The Court should seal the designated portions of Facebook's Amended and Supplemental

1 Response to Plaintiffs' Second Set of Interrogatories (Exhibit 19 to the Williams MSJ Opp.
 2 Declaration), which contain information relating to the details of Facebook's technological
 3 capabilities to determine IP-address information associated with photographs uploaded to
 4 Facebook, and its ability to associate those IP-addresses with geographic locations. Nadolenco
 5 Sealing Decl. ¶ 23. Facebook's good cause to seal these records is detailed in the 12/7/17 Yadan
 6 Declaration (at ¶ 34), namely, that public release of this information would cause Facebook harm
 7 by providing competitors with insight into location capabilities and how Facebook designs its
 8 computer systems and its proprietary facial-recognition technology.

9 **6. Portions of Plaintiffs' Opposition**

10 In accordance with Local Rule 79-5, Facebook has narrowly redacted certain portions of
 11 plaintiffs' opposition to Facebook's motion for summary judgment that reference or quote from
 12 confidential information contained in the exhibits, deposition testimony, and declarations that
 13 Facebook seeks to maintain under seal. Nadolenco Sealing Decl. ¶ 24-25.

14 **C. Facebook's Reply in Support of its Motion For Summary Judgment**

15 Facebook also seeks to seal those portions of its reply in support of its motion for
 16 summary judgment that reference or quote from confidential information contained in the
 17 exhibits, deposition testimony, and declarations that Facebook seeks to maintain under seal.
 18 Facebook has submitted a narrowly redacted version of the brief pursuant to Local Rule 79-5.
 19 Nadolenco Sealing Decl. ¶ 24-25.

20 **D. Facebook's Motion to Exclude Portions of the Expert Report, Opinions, and**
 21 **Testimony of Dr. Atif Hashmi**

22 **1. Expert Reports**

23 Exhibits 1 and 9 to the Declaration of John Nadolenco in Support of Facebook's motion
 24 to exclude portions of the expert report, opinions, and testimony of Dr. Atif Hashmi ("Nadolenco
 25 Hashmi Decl.") are copies of the same expert reports appearing at Exhibits 9 and 1 to the
 26 Nadolenco MSJ Declaration, respectively. The Court should seal these exhibits for the reasons
 27 identified above at II.A.3.

2. Excerpts from Certain Deposition Transcripts

Facebook seeks to seal the transcripts from the October 26, 2017 deposition of Omry Yadan (Exhibit 3 to the Nadolenco Hashmi Declaration) and the October 18, 2016 deposition of Yaniv Taigman (Exhibit 4 to the Nadolenco Hashmi Declaration). The compelling reasons to seal Mr. Taigman's and Mr. Yadan's deposition testimony are described above at A.4. Facebook also seeks to seal the transcript from the February 23, 2018 deposition of Dr. Atif Hashmi (Exhibit 2 to the Nadolenco Hashmi Declaration) for the reasons described above at II.A.5.

3. Portions of Facebook's Motion

In accordance with Local Rule 79-5, Facebook has narrowly redacted portions of its motion to exclude portions of the expert report, opinions, and testimony of Dr. Atif Hashmi that reference or quote from confidential information contained in the material that Facebook seeks to maintain under seal. Nadolenco Sealing Decl. ¶ 24-25.

E. Plaintiffs' Opposition to Facebook's Motion to Exclude Portions of the Expert Report, Opinions, and Testimony of Dr. Atif Hashmi

1. Excerpts from Certain Deposition Transcripts

Facebook seeks to seal the transcripts from the February 23, 2018 deposition of Dr. Atif Hashmi (Exhibit 2 to the Declaration of Corban S. Rhodes in opposition to Facebook’s motion to exclude portions of the expert report, opinions, and testimony of Dr. Atif Hashmi (“Rhodes Decl.”)) and the February 26, 2018 deposition of Jeffrey S. Dunn (Exhibit 10 to the Rhodes Decl.) for the reasons described above at II.A.5. Facebook seeks to seal the transcript from the February 28, 2018 deposition of Dr. Matthew Turk (Exhibit 8 to the Rhodes Decl.) for the reasons described above at II.B.3. Finally, Facebook seeks to seal the transcript from the October 26, 2017 deposition of Omry Yadan for the reasons described above at II.A.4.³

³ As noted above, plaintiffs submitted complete copies of these deposition transcripts rather than excerpts reflecting pages cited in their briefing. As attachments to this motion, Facebook is submitting sealed and public-redacted versions of the transcripts (Exhibits 2, 8, and 10 to the Rhodes Declaration) that exclude non-cited pages. Facebook requests that the copies of the full transcripts as initially submitted by plaintiffs remain entirely under seal.

2. Portions Of Plaintiffs' Opposition

In accordance with Local Rule 79-5, Facebook has narrowly redacted certain portions of plaintiffs' opposition to Facebook's motion that reference or quote from confidential information contained in the exhibits, deposition testimony, and declarations that Facebook seeks to maintain under seal. Nadolenco Sealing Decl. ¶ 24-25.

F. Facebook's Reply in Support of Its Motion to Exclude Portions of the Expert Report, Opinions, and Testimony of Dr. Atif Hashmi

Facebook requests to seal two exhibits to the declaration of John Nadolenco filed in support of its reply in support of its motion (“Supplemental Nadolenco Hashmi Decl.”). Exhibit 14 is a copy of Exhibit 1 to the Nadolenco MSJ Declaration and should be sealed for the reasons described above at II.A.3. Exhibit 16 is an excerpt from transcript of the February 23, 2018 deposition of Dr. Atif Hashmi; the compelling reasons to seal this document are described above at II.A.5. Finally, Facebook requests to seal those portions of its reply that reference or discuss the information contained in materials that it seeks to maintain under seal. Facebook has submitted a narrowly redacted version of the brief pursuant to Local Rule 79-5. Nadolenco Sealing Decl. ¶ 24-25.

G. Facebook's Motion to Strike and/or Exclude the Expert Report of Jeffrey S. Dunn

1. Expert Reports

Facebook seeks to seal the expert reports of Mr. Dunn, Dr. Turk, and Dr. Hasmi, attached as Exhibits 1, 7, and 8, respectively, to the declaration of John Nadolenco in support of Facebook’s motion to strike and/or exclude the expert report of Jeffrey S. Dunn (“Nadolenco Dunn Declaration”). These documents are copies of Exhibits 7, 3, and 9 to the Nadolenco MSJ Declaration, respectively, and should be sealed for the reasons described above in II.A.3.

2. Excerpts from Certain Deposition Transcripts

Facebook requests to seal the excerpts from the October 26, 2017 deposition of Omry Yadan, the October 18, 2016 deposition of Yaniv Taigman, the February 23, 2018 deposition of Dr. Atif Hashmi, and the February 26, 2018 deposition of Jeffrey S. Dunn, submitted as Exhibits

1 2, 3, 6, and 9 to the Nadolenco Dunn Declaration, respectively. The compelling reasons to seal
 2 Exhibits 2 and 3 are described above in II.A.4, and the compelling reasons to seal Exhibits 6 and
 3 9 are described above in II.A.5.

4 **3. Portions of Facebook's Motion**

5 In accordance with Local Rule 79-5, Facebook has narrowly redacted portions of its
 6 motion that reference or quote from confidential information contained in the expert reports,
 7 confidential deposition testimony, and exhibits that Facebook seeks to maintain under seal.
 8 Nadolenco Sealing Decl. ¶ 24-25.

9 **H. Plaintiffs' Opposition to Facebook's Motion to Strike and/or Exclude the**
Expert Report of Jeffrey S. Dunn

10 In support of their opposition to Facebook's motion, plaintiffs attached as Exhibits 2, 8, 9
 11 and 10 to the declaration of Corban S. Rhodes excerpts from the transcripts of the February 23,
 12 2018 deposition of Dr. Atif Hashmi; the February 28, 2018 deposition of Dr. Matthew Turk; the
 13 October 26, 2017 deposition of Omry Yadan; and the February 26, 2018 deposition of Jeffrey S.
 14 Dunn. The compelling reasons to seal the Hashmi and Dunn deposition transcripts are described
 15 above at II.A.5, and the compelling reasons to seal the Turk and Yadan deposition transcripts are
 16 described above at II.B.3 and II.A.4, respectively. Facebook also requests to seal those portions
 17 of plaintiffs' opposition that describe and/or reference the confidential information contained in
 18 the materials that Facebook seeks to maintain under seal. Nadolenco Decl. ¶¶ 24-25.

19 **I. Facebook's Reply in Support of Its Motion to Strike and/or Exclude the**
Expert Report of Jeffrey S. Dunn

20 Facebook requests to seal exhibit 11 to the declaration of John Nadolenco filed in support
 21 of its reply in support of its motion, which contains additional excerpts from the February 28,
 22 2018 deposition of Jeffrey S. Dunn. The compelling reasons for sealing exhibit 11 are discussed
 23 above in II.A.5. Facebook also seeks to maintain under seal the portions of its reply that
 24 reference or quote from confidential information contained in the expert reports, confidential
 25

1 deposition testimony, and other exhibits that Facebook seeks to maintain under seal. Nadolenco
 2 Sealing Decl. ¶¶ 24-25.

3 **J. Plaintiffs' Motion for Partial Summary Judgment**

4 **1. Expert Reports**

5 Facebook seeks to seal the expert reports of Dr. Hashmi, Mr. Dunn, and Dr. Turk,
 6 attached as exhibits 10, 11, and 12, respectively, to the declaration of Shawn Williams in support
 7 of plaintiffs' motion for partial summary judgment ("Williams MSJ Decl."). The compelling
 8 reasons to seal each of these expert reports is described above at II.A.3.

9 **2. Excerpts from the Turk and Taigman Deposition Transcripts**

10 Facebook also seeks to seal the transcripts from the February 28, 2018 deposition of Dr.
 11 Matthew Turk and the October 18, 2016 deposition of Yaniv Taigman, attached as exhibits 9 and
 12 21 to the Williams MSJ Declaration, respectively, for the reasons described above at II.B.3
 13 (Turk) and at II.A.4 (Taigman).⁴

14 **3. Certain Exhibits to Plaintiffs' Motion for Partial Summary Judgment**

15 Plaintiffs' motion for partial summary judgment attached certain of Facebook's business
 16 records which should be sealed because they reveal Facebook's trade secrets and confidential
 17 business information. Exhibit 3 reflects Facebook's communications with a government entity
 18 concerning its facial-recognition technology, which are maintained as confidential by both sides
 19 to the communication. *See* Sherman Decl. ¶ 20. Exhibits 1, 6, 8, 14, 19, 20 and 30 reference or
 20 discuss confidential details about Facebook's network architecture and its facial recognition and
 21 other technologies, the public release of which would harm Facebook by providing competitors
 22 with insight into how Facebook designs its computer systems and its proprietary facial-
 23 recognition technology. 12/7/17 Yadan Decl. ¶ 34; Nadolenco Sealing Decl. ¶¶ 11-12.

24 ⁴ As noted above, plaintiffs submitted complete copies of these deposition transcripts
 25 rather than excerpts reflecting pages cited in their briefing. As attachments to this motion,
 26 Facebook is submitting sealed and public-redacted versions of the transcripts (Exhibits 9 and 21
 27 to the Williams MSJ Declaration) that exclude non-cited pages. Facebook requests that the
 copies of the full transcripts as initially submitted by plaintiffs remain entirely under seal.

1 Additional exhibits should be sealed because they discuss confidential details about Facebook's
 2 strategic plans for the Tag Suggestions feature (Exhibits 15, 24, and 28) or regarding potential
 3 future uses of facial-recognition technology (Exhibits 25-26). *See, e.g., Bauer Bros. LLC*, 2012
 4 WL 1899838, at *2 (sealing "marketing strategies" and "product development plans"); *Rich*,
 5 2009 WL 10628294, at *1 (sealing "marketing and disclosure strategies").

6 **4. Portions of Plaintiffs' Motion for Partial Summary Judgment**

7 In accordance with Local Rule 79-5, Facebook has narrowly redacted certain portions of
 8 plaintiffs' motion for partial summary judgment that reference or quote from confidential
 9 information contained in the exhibits, deposition testimony, and declarations that Facebook seeks
 10 to maintain under seal. Nadolenco Sealing Decl. ¶¶ 24-25.

11 **K. Facebook's Opposition to Plaintiffs' Motion for Partial Summary Judgment**

12 **1. Expert Reports**

13 Facebook seeks to seal the expert reports of Dr. Turk and Dr. Hashmi attached as exhibits
 14 3, 6, and 7, respectively, to the declaration of John Nadolenco in support of Facebook's
 15 opposition to plaintiffs' motion for partial summary judgment ("Nadolenco MSJ Opp.
 16 Declaration"). The compelling reasons to seal these reports are described above at II.A.3.

17 **2. Excerpts from Certain Deposition Transcripts**

18 Facebook also seeks to seal the excerpts from the transcripts of the February 23, 2018
 19 deposition of Dr. Atif Hshmi; the February 26, 2018 deposition of Jeffrey S. Dunn; and the
 20 February 28, 2018 deposition of Dr. Matthew Turk. The compelling reasons to seal these
 21 transcripts are described above at II.A.5 (Hashmi and Dunn) and II.B.3 (Turk).

22 **3. The Yadan Declaration**

23 Exhibit 8 to the Nadolenco MSJ Opp. Declaration—the January 25, 2018 Declaration of
 24 Omry Yadan—is a copy of Exhibit 10 the Nadolenco MSJ Declaration. The compelling reasons
 25 for sealing this declaration are described above at II.A.1.

26 **4. Certain Exhibits to Facebook's Opposition**

1 Facebook attached to its opposition certain business records which should be sealed
 2 because they reveal Facebook's trade secrets and confidential business information regarding: (i)
 3 Facebook's facial-recognition technology (Exhibits 9 and 19); and (ii) Facebook's strategic plan
 4 for the Tag Suggestions feature, including confidential statistics regarding use of the feature
 5 (Exhibit 16). Public release of this information would cause Facebook harm by providing
 6 competitors with insight into how Facebook implements its proprietary facial-recognition
 7 technology. 12/7/17 Yadan Decl. ¶ 34; Nadolenco Sealing Decl. ¶¶ 11-12.

8 **5. Portions of Facebook's Opposition**

9 In accordance with Local Rule 79-5, Facebook has narrowly redacted certain portions of
 10 its opposition that reference or quote from confidential information contained in the exhibits,
 11 deposition testimony, and declarations that Facebook seeks to maintain under seal. Nadolenco
 12 Sealing Decl. ¶¶ 24-25.

13 **L. Plaintiffs' Reply in Support of Their Motion for Partial Summary Judgment**

14 **1. The Yadan and Barak Deposition Transcripts**

15 Facebook seeks to seal the designated portions of the transcripts to the February 28, 2018
 16 deposition of Omry Yadan and the October 10, 2017 deposition of Dan Barak, attached as
 17 exhibits 35 and 37, respectively, to the declaration of Shawn Williams in support of plaintiffs'
 18 reply in support of their motion for partial summary judgment ("Supplemental Williams MSJ
 19 Declaration"). The compelling reasons for sealing the Yadan deposition transcript are described
 20 above at II.A.4. Additionally, Mr. Barak testified in detail about Facebook's network
 21 architecture, how Facebook's proprietary facial-recognition technology works, the way in which
 22 Facebook's computer systems interact with and support Facebook's facial recognition
 23 technology, and Facebook's strategic plan for the Tag Suggestions feature. These portions of
 24 Mr. Barak's deposition have been designated by Facebook as "Highly Confidential – Attorneys'
 25 Eyes Only" pursuant to the Protective Order. Public release of this information would cause
 26 Facebook harm by providing competitors with insight into how Facebook designs its computer
 27

1 systems and its proprietary facial-recognition technology. 12/7/17 Yadan Decl. ¶ 34; Nadolenco
 2 Sealing Decl. ¶¶ 8, 16-17.⁵

3 **2. Certain Exhibits to Plaintiffs' Reply**

4 Exhibits 32, 34, 36, 42, 43, and 47 to plaintiffs' reply in support of their motion for
 5 partial summary judgment should be maintained under seal because they reflect Facebook's
 6 confidential business information regarding: (i) communications with a government entity about
 7 Facebook's facial-recognition technology, which are maintained as confidential by both sides to
 8 the communication (Exhibit 34; *see* Sherman Decl. ¶ 20); (ii) confidential details about
 9 Facebook's network architecture and facial-recognition and other proprietary technologies
 10 (Exhibits 36, 42, and 47; *see* 12/7/17 Yadan Decl. ¶ 34); and (ii) confidential details regarding
 11 Facebook's strategic plan, including its marketing and communication strategies, for its Tag
 12 Suggestions feature. Nadolenco Sealing Decl. ¶¶ 11-12.

13 **3. Portions of Plaintiffs' Reply**

14 In accordance with Local Rule 79-5, Facebook has narrowly redacted certain portions of
 15 plaintiffs' reply in support of its motion for partial summary judgment that reference or quote
 16 from confidential information contained in the exhibits, deposition testimony, and declarations
 17 that Facebook seeks to maintain under seal. Nadolenco Sealing Decl. ¶¶ 24-25.

18 **M. Plaintiffs' Motion to Exclude the Testimony of Defendants' Proposed Expert**
 19 **Matthew Turk, Ph.D.**

20 **1. Expert Report and Notes**

21 The Court should seal the Expert Report of Dr. Matthew Turk (Exhibit 3 to the
 22 declaration of Shawn A. Williams in support of plaintiffs' motion to exclude the testimony of
 23 defendants' proposed expert Matthew Turk, Ph.D. ("Williams Turk Declaration")) for the

24 ⁵ As noted above, plaintiffs submitted complete copies of these deposition transcripts
 25 rather than excerpts reflecting pages cited in their briefing. As attachments to this motion,
 26 Facebook is submitting sealed and public-redacted versions of the transcripts (Exhibits 35 and 37
 27 to the Supplemental Williams Declaration) that exclude non-cited pages. Facebook requests that
 the copies of the full transcripts as initially submitted by plaintiffs remain entirely under seal.

1 reasons described above in II.A.3. Facebook also requests that the Court seal the notes taken by
 2 Dr. Turk in connection with his engagement (Exhibit 9 to the Williams Turk Declaration)
 3 because those notes contain information relating to the details of Facebook's network
 4 architecture and its facial recognition technology as addressed in Dr. Turk's reports, and
 5 Facebook has designated the notes "Highly Confidential – Attorneys' Eyes Only" pursuant to the
 6 Protective Order. 12/2/17 Yadan Decl. ¶ 34; Nadolenco Sealing Decl. ¶¶ 8, 22.

7 **2. Excerpt from the Turk Deposition Transcript**

8 Facebook seeks to maintain under seal Exhibit 4 to the Williams Turk Declaration, which
 9 contains excerpts of the February 28, 2018 deposition of Dr. Matthew Turk. The compelling
 10 reasons to maintain that document under seal are described above at II.B.3.

11 **3. Certain Exhibits to Plaintiff's Motion**

12 Exhibits 1, 2, 7, and 11 to the Williams Turk Declaration should be maintained under seal
 13 because they contain confidential information about Facebook's network architecture and facial-
 14 recognition and other proprietary technologies (Exhibits 36, 42, and 47). Public disclosure of
 15 such information could put Facebook and the people who use Facebook at increased risk of
 16 cyber attack by malicious actors. 12/7/17 Yadan Decl. ¶ 34; Nadolenco Sealing Decl. ¶¶ 11-12.

17 **4. Portions of Plaintiffs' Motion**

18 In accordance with Local Rule 79-5, Facebook has narrowly redacted certain portions of
 19 plaintiffs' motion to exclude the testimony of defendants' proposed expert Matthew Turk, Ph.D.
 20 that reference or quote from confidential information contained in the exhibits, deposition
 21 testimony, and declarations that Facebook seeks to maintain under seal. Nadolenco Sealing
 22 Decl. ¶¶ 24-25.

23 **N. Facebook's Opposition to Plaintiffs' Motion to Exclude the Testimony of**
Defendants' Proposed Expert Matthew Turk, Ph.D.

24 **1. Expert Reports**

25 The Court should seal the expert reports of Dr. Matthew Turk (Exhibits 1 and 2 to the
 26 declaration of John Nadolenco in support of Facebook's opposition to plaintiffs' motion to
 27

1 exclude the testimony of defendants' proposed expert Matthew Turk, Ph.D ("Nadolenco Turk
 2 Opp. Decl.")" and Dr. Atif Hashmi (Exhibit 3 to the Nadolenco Turk Opp. Declaration) for the
 3 reasons described above in II.A.3.

4 **2. Excerpt from the Turk Deposition Transcript**

5 Facebook seeks to maintain the seal on Exhibit 6 to the Nadolenco Turk Opp.
 6 Declaration, which contains excerpts of the February 28, 2018 deposition of Dr. Matthew Turk.
 7 The compelling reasons to maintain that document under seal are described above at II.B.3.

8 **3. Portions of Facebook's Opposition**

9 In accordance with Local Rule 79-5, Facebook has narrowly redacted certain portions of
 10 its opposition that reference or quote from confidential information contained in the exhibits,
 11 deposition testimony, and declarations that Facebook seeks to maintain under seal. Nadolenco
 12 Sealing Decl. ¶¶ 24-25.

13 **O. Plaintiffs' Reply in Support of Their Motion to Exclude the Testimony of
 14 Defendants' Proposed Expert Matthew Turk, Ph.D.**

15 **1. Expert Reports**

16 The compelling reasons to seal the expert reports of Jeffrey S. Dunn and Dr. Atif Hashmi,
 17 attached as exhibits 12 and 13, respectively, to the declaration of Shawn Williams in support of
 18 plaintiffs' reply in support of their motion to exclude the testimony of defendants' proposed
 19 expert Dr. Matthew Turk ("Williams Turk Reply Declaration"), are described above at II.A.3.

20 **2. Excerpts of the Hashmi and Dunn Deposition Transcripts**

21 Facebook seeks to seal the excerpts from the transcripts of the February 23, 2018
 22 deposition of Dr. Atif Hashmi and the February 26, 2018 deposition of Jeffrey S. Dunn, attached
 23 as exhibits 14 and 15, respectively, to the Williams Turk Reply Declaration, for the reasons
 24 described above at II.A.5.⁶

25 ⁶ As noted above, plaintiffs submitted complete copies of these deposition transcripts
 26 rather than excerpts reflecting pages cited in their briefing. As attachments to this motion,
 27 Facebook is submitting sealed and public-redacted versions of the transcripts (Exhibits 14 and 15
 to the Williams Turk Reply Declaration) that exclude non-cited pages. Facebook requests that

3. Certain Exhibits to Plaintiffs' Reply

2 Exhibits 16 and 18-20 to plaintiffs' reply in support of their motion to exclude the
3 testimony of defendants' proposed expert Matthew Turk, Ph.D. should be maintained under seal
4 because they reflect Facebook's confidential business information regarding: (i) communications
5 with a government entity concerning its facial recognition technology, which are maintained as
6 confidential by both sides to the communication (Exhibit 16; Sherman Decl. ¶ 20); (ii) the details
7 of Facebook's network architecture and its facial recognition technology, which Facebook
8 maintains as a trade secret (Exhibit 18; 12/2/17 Yadan Decl. ¶ 34); and (iii) confidential details
9 of Facebook's marketing and product strategies, public release of which would harm Facebook
10 by providing competitors with insight into how Facebook designs its computer systems and
11 proprietary facial-recognition technology (Exhibit 19 and 20). Nadolenco Sealing Decl. ¶¶ 11-
12 12.

4. Portions of Plaintiffs' Reply

14 In accordance with Local Rule 79-5, Facebook has narrowly redacted certain portions of
15 plaintiffs' reply that reference or quote from confidential information contained in the exhibits,
16 deposition testimony, and declarations that Facebook seeks to maintain under seal. Nadolenco
17 Sealing Decl. ¶¶ 24-25.

P. Exhibits That May Be Unsealed

19 Facebook does not seek to maintain under seal any of the following documents filed by
20 plaintiffs provisionally under seal in accordance with Local Rule 79-5(e):

- Exhibit 18 to the declaration of Shawn Williams in support of plaintiffs' opposition to Facebook's motion for summary judgment;
- The Declaration of Shawn Williams in Support of Plaintiffs' Motion for Partial Summary Judgment;

the copies of the full transcripts as initially submitted by plaintiffs remain entirely under seal.

- 1 • Exhibits 2, 5, and 7 to the declaration of Shawn Williams in support of plaintiffs' motion for partial summary judgment;
- 2 • Exhibit 31 to the declaration of Shawn Williams in support of plaintiffs' reply in support of their motion for partial summary judgment;
- 3 • The Declaration of Shawn A. Williams in Support of Plaintiffs' Notice of Motion and Motion to Exclude the Testimony of Defendant's Proposed Expert Matthew Turk, Ph.D.; and
- 4 • Exhibit 8 to the declaration of Shawn Williams in support of plaintiffs' motion to exclude the testimony of defendant's proposed expert Matthew Turk, Ph.D.

5 Similarly, Facebook understands that plaintiffs do not seek to maintain under seal any of
6 the following documents filed by Facebook provisionally under seal in accordance with Local
7 Rule 79-5(e):

- 8 • Exhibits 13-15 to the declaration of John Nadolenco in support of Facebook's motion for summary judgment;
- 9 • Exhibit 21 to the declaration of John Nadolenco in support of Facebook's opposition to plaintiffs' motion for partial summary judgment; and
- 10 • Exhibits 4-5 to the declaration of John Nadolenco in support of Facebook's opposition to plaintiffs' motion to exclude the testimony of defendant's proposed expert Matthew Turk, Ph.D.

11 **III. CONCLUSION**

12 Facebook respectfully requests that the Court grant its motion.

13 Dated: May 14, 2018

MAYER BROWN LLP

14 By: /s/ John Nadolenco
John Nadolenco
Lauren R. Goldman
Michael R. Rayfield

15 *Counsel for Defendant Facebook, Inc.*